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No. 96-1909

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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HUGH FOSTER,

*Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION and DENNY SLAYTON,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unpublished. *See* Pet. App. 1 n.*. The successive opinions of the district court—dismissing the case, permitting amendment of the complaint, and again dismissing the case after amendment—are not reported in Federal Supplement, but they may be found, respectively, at 1995 WL 747476, 1996 WL 37776, and 1996 WL 194938.

## JURISDICTION

The judgment of the court of appeals was entered on November 21, 1996. On February 19, 1997, petitioner requested, and on February 20, 1997, Justice Scalia granted, an extension of time for the filing of a certiorari petition, to and including February 26, 1997. *See* 28 U.S..C § 2101(c); S. Ct. Rule 30.2. A petition was filed on February 26, 1997 (and docketed, after resubmission, three months later). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT

Petitioner Foster was an employee of respondent IBM, working under the supervision of respondent Slayton.* According to the complaint in this case, IBM demoted petitioner in early 1994 and then, on September 22, 1994, notified him that he was being discharged, with his last day of work to be November 30, 1994. *See* Pet. App. 2; Pet. 15-16. Petitioner filed this suit under Louisiana law, alleging racial discrimination, on September 29, 1995. Pet. App. 2-3. Petitioner thus filed his suit more than one year after the notice of discharge, even though the well-established judicial decisions in the area (both federal and state) had clearly held that such an action was governed by Louisiana's one-year statute of limitations and that the state-law period, like its federal Title VII counterpart, began to run upon the notice of discharge, the last alleg-

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* Pursuant to Rule 29.6 of the Rules of this Court, IBM states that it has no parent company and that it owns less than 100% but at least 10% of Object Design Inc.

Although the caption of the petition names Denny Slayton as a respondent, petitioner did not include Slayton on the Certificate of Interested Persons in his court of appeals brief, thus (despite the "*et al.*" after IBM in the caption on that brief) apparently excluding him from the case in the Fifth Circuit. *See* S. Ct. Rule 12.6 (only "parties to the proceeding in the court whose judgment is sought to be reviewed" are respondents in this Court). The Fifth Circuit had no occasion to decide Slayton's status.

edly discriminatory act. *See Jay v. International Salt Co.*, 868 F.2d 179, 180-81 (5th Cir. 1989); *Williams v. Conoco, Inc.*, 860 F.2d 1306, 1307-08 (5th Cir. 1988); *Winbush v. Normal Life of Louisiana*, 599 So. 2d 489, 491 (La. App. 3d Cir. 1992); *see also Chardon v. Fernandez*, 454 U.S. 6 (1981) (Title VII); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII).

After removal to the United States District Court for the Eastern District of Louisiana, which possessed diversity jurisdiction, respondents moved to dismiss the suit as out of time. The district court granted the motion in December 1995, relying on the foregoing precedents. *Foster v. IBM*, 1995 WL 747476. In January 1996, the district court permitted petitioner to amend his complaint to add the fact that the notice of discharge had stated: " 'While internal placement activities may be undertaken, opportunities for placement within IBM are expected to be very limited. You do not have the option of assuming a job that would displace another IBM regular employee.' " Pet. App. 9; *see Foster v. IBM*, 1996 WL 37776. Based on the amended complaint, petitioner was permitted to reargue the timeliness of his suit, now relying on a more recent state-court decision, *Harris v. Home Savings and Loan Assoc.*, 663 So. 2d 92, 95 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 405 (La. 1995).

Upon a renewed motion to dismiss, the district court again held the complaint untimely. *Foster v. IBM*, 1996 WL 194938. The court concluded that *Winbush*, *Williams*, and *Jay* stated the applicable law and that *Harris* presented unusual facts rendering it inapplicable here. The court relied on a number of additional federal-court decisions reaching a similar conclusion (under Title VII) where an employer issues a notice of discharge that does not qualify the firing except to refer to the possibility of placement elsewhere in the company. *Id.* at *2-*4. The court distinguished *Harris* on the ground that the employee in *Harris* had been offered and actually accepted continued

employment for more than an additional year after being notified that he would eventually lose his job, whereas petitioner's notice of imminent discharge was unequivocal, because the "placement" language was not an offer of further employment. *Foster,* 1996 WL 194938 at * n.2.

The court of appeals, in an unpublished decision, affirmed without dissent. Pet. App. 1-10. Like the district court, the Fifth Circuit found that *Harris* was distinguishable on its "unusual facts" and hence that the state-law limitations issue in this case was governed by the notification rule of *Williams, Jay,* and *Winbush.* Pet. App. 6. The court read *Harris* as resting on the peculiar fact that the employee was not unequivocally fired, but instead placed in a limbo subject to the employer's manipulation if the one-year limitations period had begun to run upon the initial notice. In particular, the *Harris* employer, rather than firing the employee outright, made an offer, which the employee accepted, of more than one year's continuation of employment; in those circumstances, the employee had good reason to believe that employment might be extended still further and, therefore, to refrain from suing for the entire year after his initial notice—with the result, if no further employment was in fact forthcoming but the one-year clock had already run, that the employee would have lost his remedy. Pet. App. 6-9. In this case, by contrast, the court of appeals concluded that "the letter notifying Foster that he was fired was unequivocal," the termination date was only two months later (so there was no impediment to suing within the one-year period after leaving the company), and the above-quoted language about the possibility of internal placement did not "g[i]ve hope of another position in the company being available." *Id.* at 9. Accordingly, the court of appeals held that this case is governed by the general rule starting the statute of limitations when clear notice of discharge was given. *Id.* at 9-10.

## ARGUMENT

The decision of the court of appeals is an unpublished ruling on an issue of state law. It raises no issue of general importance, and it does not conflict with decisions of this Court or of any other court. The grounds for review raised by petitioner lack merit. The petition should be denied.

Petitioner primarily contends that the Fifth Circuit should have certified the question of when the clock begins to run under Louisiana law on the state-law cause of action for discrimination. Pet. i, 17-21. This contention should be rejected. At no point did petitioner make any request for certification of this state-law question in the district court or in the court of appeals. Nor did either court make any pronouncement or other ruling as to certification. A question not raised or decided in the lower courts is not a suitable candidate for review. *See, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

This case presents no occasion for an exception to that important rule—or for what amounts to the same thing, *de novo* certification by this Court (as petitioner requests, *see* Pet. i-ii, 24-25). Certification of a state-law issue is a matter of discretion for the federal courts, based on various considerations, including the federal courts' own ability to resolve the issue in a principled rather than conjectural way, the delay and expense caused by the diversion of the case to another court, and any special need for authoritative finality on the particular state-law issue. *See Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974); *id.* at 394 (Rehnquist, J., concurring); *Florida ex rel. Shevin v. Exxon Corp.,* 526 F.2d 266, 274-75 (5th Cir.), *cert. denied,* 429 U.S. 829 (1976); 17A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure 2d* § 4248, at 157-79 (1988). The last-minute request for certifica-

tion in this case, coming only after petitioner had forced two federal courts to expend effort to resolve the state-law question and lost, presents the weakest possible claim for certification. All four judges—in a circuit that is thoroughly familiar with certification (*see id.* at 176 (Fifth Circuit has "by far the greatest experience" with certification)) and with the law of the State at issue—were able to resolve the Louisiana-law question in an undeniably principled fashion. And there is no special need for authoritative state-court resolution of the statute-of-limitations question: litigants in petitioner's position have it entirely within their power to avoid any adverse impact by filing in accordance with the earlier filng date, as petitioner could have done by filing one week sooner.

Petitioner cites no precedent for certification in circumstances like this. Virtually all, if not all, certifications directly by this Court have occurred in cases where this Court already had before it a federal-law issue of independent importance, such as the constitutionality of a state law or practice, and authoritative interpretation of state law might have altered or eliminated the federal issue. *See* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practce* § 9.4, at 457-60 (7th ed. 1993). The Court in *Lehman Bros. v. Schein, supra*, made clear that certification also is available in a diversity case, but *Lehman* is no precedent for what petitioner requests. In *Lehman*, certification had been sought in the court of appeals, which had simply taken too narrow a view of the availability of that procedure; the underlying state-law issue of corporate fiduciary duties was broadly important, involved the law of a State (Florida) distant from the federal forum (in New York), and could not have been avoided by the plaintiff; and even in those circumstances, this Court did not itself order certification, but merely clarified the availability of certification and remanded for the court of appeals to exercise its discretion under the clarified standards. 416 U.S. at 389, 391-92. *Lehman* is

thus no precedent for this Court's certification in the present case.

Finally, to the extent that the petition might be read, despite the limited questions presented (Pet. i-ii), to raise the underlying question of state law (*see* Pet. 21-24), the case does not warrant review. The court of appeals, like the district court, carefully carried out its federal-law obligation to determine the governing state law by analyzing the pertinent state-law precedents. Accordingly, all that remains is a dispute over the right answer to the state-law question. But the resolution of that question by all four judges below—that *Harris* was an unusual case distinguishable from the principal authority of *Winbush, Williams,* and *Jay*—is unquestionably a reasonable reading of Louisiana law, one that is fully in accord with Title VII law on the point. The state-law question, as to which this Court would give the Fifth Circuit deference (*see McMillian v. Monroe County,* No. 96-542 (June 2, 1997), slip op. 5) and which this Court cannot settle with finality, is not an appropriate matter for this Court's use of its resources. *See* S. Ct. Rule 10(a); *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra,* § 4.2 at 165-66, § 4.10, at 181-84.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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